UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PATRICK J. MORIARTY, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency. (CSA 3 026 346)	DOCKET NUMBER DC08468910097 DATE: MAR 13 1991

Patrick J. Moriarty, Huddleston, Virginia, pro se.

Jane N. Lohr, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has submitted a petition for review of an initial decision issued on February 1, 1989, sustaining the reconsideration decision of the Office of Personnel Management (OPM) denying his request to make a retroactive election to transfer to the Federal Employees Retirement System (FERS). For the reasons set forth below, the Board DENIES the petition for review under 5 C.F.R. § 1201.115. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED in the Opinion and Order, still sustaining the reconsideration decision.

Background

The Federal Employees' Retirement System Act of 1986 (FERA) established a new retirement system which includes Social Security coverage for Federal employees. Under this new system, those Federal employees covered by the Civil Service Retirement System (CSRS) were given a one-time opportunity, from July 1, 1987, to December 31, 1987, to elect to transfer to the Federal Employees Retirement System (FERS). 42 U.S.C. § 402 (1988). A major factor considered by certain employees in making their choice between the two retirement systems was the public pension offset. Under the Social Security public pension offset (PPO), the amount of Social Security benefits that an individual may receive, based on the Social Security coverage of his or her spouse, is reduced if he or she receives a pension based on work performed for Federal, state or local government. 42 U.S.C. § 402. (1988). Thus, if an individual retires from the Federal service under the Civil Service Retirement System (CSRS), and is also eligible for Social Security benefits as a spouse or survivor, that individual's Social Security benefits will be reduced by two-thirds of the amount of the benefit payable based upon his or her earnings while in the service of the Federal government. All Federal employees covered under the CSRS are subject to the PPO. At the time of this appellant's retirement on December 18, 1987, Federal employees covered by FERS were not subject to

the PPO, but legislation concerning the PPO's applicability to FERS was pending.

In October 1987, the House of Representatives passed legislation which provided that only Federal employees who completed 5 years of Federal government service covered by Social Security after June 30, 1987, would be exempt from the government pension offset. This legislation was to be retroactive to June 30, 1987. A transition period was provided for those employees who would turn 65 during the years from 1987 to 1992, in that proportionately less Social Security covered service was required for such individuals. The minimum covered service was 6 months for persons who were 65 or over during 1987. *See* H.R. Rep. No. 100-391(II), 100th Cong., 1st Sess. 4 (1987). Thus, it appeared that employees electing to change to FERS immediately before retiring would not be able to avoid the PPO.

After the bill was sent to the Senate, a conference agreement was reached which resulted in a modification to the House bill. In the modified bill, the 5-year requirement was to be effective prospectively; that is, it would be effective with respect to employees who elected to become covered under FERS during any election period which occurred on or after January 1, 1988. *See* H.R. Conf. Rep. No. 100-495, 100th Cong., 1st Sess. 4 (1987). Thus, under the modified bill, anyone who elected FERS before December 31, 1987, would avoid the offset. The House passed this bill as modified on December 21, 1987, the Senate passed it

on December 22, 1987, and the President signed it into law on December 22, 1987.

In early 1988, OPM promulgated the following regulation:

> On determination by an employing office that the FERS transfer handbook issued by OPM was not available to an individual in a timely manner or an individual was unable, for cause beyond his or her control, to elect FERS coverage within the prescribed time limit, the employing office may, within 6 months after expiration of the individual's opportunity to elect FERS coverage under § 846.201, accept the individual's election of FERS coverage.

5 C.F.R. § 846.204 (a).

The appellant retired from the Farm Credit Administration (FCA) on December 18, 1987, under the CSRS. On July 11, 1988, seeking to avoid the offset, he submitted an application to FCA to make a belated retroactive transfer to FERS under 5 C.F.R. § 846.204(a). FCA denied the request, finding that it was without authority to effect a FERS transfer for an employee who had retired. The appellant requested OPM reconsideration of the FCA decision. OPM issued a reconsideration decision that denied the request. It found that the appellant was not prevented from making an informed election of FERS at the time of his retirement and that he therefore was not eligible to make a belated election under 5 C.F.R. § 846.204(a).*

---

*We note that the appellant's request for a belated election was filed after the end of the six-month period provided for by 5 C.F.R. § 846.204(a). OPM did not, however, reject the appellant's request as untimely under that provision. Instead, it indicated that retroactive election would have

The appellant petitioned the Board's Washington, D.C., Regional Office for appeal of OPM's reconsideration decision, arguing that he did not elect FERS at the time of his retirement because of the information that had been furnished to him. He asserted that he was prevented from making an informed decision about retirement coverage because he received misleading information from OPM regarding the then-pending legislation. The appellant contended that he reasonably relied on FCA and OPM misinformation to his detriment. To support this argument, he submitted notices disseminated by OPM to Federal agency personnel offices, a statement from the Personnel Management Specialist at FCA that discussed the information explained at an OPM meeting with agency retirement counselors, and a letter in which this same retirement counselor further discussed OPM's information in relation to the appellant's application to change to FERS and advised him to file an appeal.

In an initial decision dated February 1, 1989, the administrative judge sustained OPM's reconsideration decision, finding that the appellant had not identified any misinformation or showed a lack of information from OPM or FCA. The administrative judge found that six months prior to the appellant's retirement, he had received a copy of the FERS Transfer Handbook. The Handbook was issued to all employees. The administrative judge found that the Handbook

---

been allowed if an administrative error had been shown. Appeal File, Tab 3(2).

accurately described the applicability of the PPO to employees under CSRS and FERS and noted that Congressional action concerning the PPO was pending. She found that the exemption from the PPO would have been available to the appellant at the time he retired had he elected to transfer to FERS, and that the appellant failed to show that he was prevented from understanding the alternatives available to him and thus from making informed timely transfer to FERS.

The appellant has filed a timely petition for review of the initial decision, alleging that the administrative judge incorrectly applied the regulations authorizing belated transfers to FERS and reasserting his contention that his employing agency and OPM provided misinformation to him. The appellant asserts that the administrative judge erred in finding that OPM advisories correctly speculated that the PPO exemption would be eliminated by legislation. He claims that the speculation was only true for those individuals retiring after December 31, 1987, while the information was furnished to those such as the appellant who were retiring prior to that date. The appellant also reasserts his claim that OPM's decision to reject his belated election to transfer to FERS is the result of an arbitrary and unfair change in policy.

ANALYSIS

The appellant requested that he be allowed to make a belated transfer to FERS under 5 C.F.R. § 846.204(a). The

plain language of that regulation clearly limits belated transfers to two categories of individuals: those who did not receive the FERS Transfer Handbook in a timely manner; and those who were unable, for cause beyond their control, to make a timely election. It is undisputed that the appellant received the Handbook in a timely manner. Appeal File, Tab 6. Thus, the issue here is whether the appellant was unable, for cause beyond his control, to make a timely election.

As detailed above, at the time of the appellant's retirement, legislation regarding the PPO was pending in Congress. No one was certain what the result would be. The appellant argues that because of this uncertainty, in trying to inform employees, OPM provided misinformation or misleading information that caused the appellant to make a choice that he would not otherwise have made and that was detrimental to him.

Included in the appeal file is a copy of a July 9, 1987, OPM cover memorandum which was sent to the agencies to notify them of "possible changes in the law." Appeal File, Tab 6. This memorandum was divided into two sections entitled "The Existing Provision" and "The Proposed Change." Under the latter it was stated that, "[w]hile we cannot predict the outcome of pending legislation with certainty, since a FERS election is irrevocable, it is crucial to notify employees that a change is likely." Appeal File, Tab 6. This memorandum did nothing more than describe the

possible effect of the subcommittee-approved provision. Moreover, the memorandum specifically used terms like "proposed changes," "cannot predict", or "change is likely" rather than stating that this change "would" occur.

Attached to the July 9, 1987, OPM memorandum was a letter that was to be distributed to all employees. Appeal File, Tab 6. This letter advised employees as follows:

> [I]f you are considering joining FERS to avoid the Public Pension Offset, you may wish to reconsider your decision or at least to postpone making your election until later in the open season by which time this situation may be clarified.
>
> *****
>
> The reason that employees considering joining FERS to avoid the offset may wish to reconsider or postpone making an election is that:
>
> * a FERS election is irrevocable, and
>
> * the survivor benefits payable under FERS are lower than those under CSRS and they cost slightly more than CSRS survivor benefits. (See page 41 of the Handbook.)
>
> Thus, if you join FERS solely to avoid the offset, retire with a survivor annuity benefit for your spouse and the rules are changed in a way that means the offset would still apply to you, you may have reduced your Basic Benefit and that of your survivor without realizing any benefit from Social Security. Since your election is irrevocable, you will not be able to change it. Even if you retire soon after joining FERS, a change in the rules may be retroactive, so the offset may still apply to you. Since the reductions in FERS benefits are primarily associated with survivor benefits, if you are electing a 'self only' benefit, the prospect of a change in the Public Pension Offset rules will be less of a concern to you.

All employees of the appellant's employing agency received a copy of the agency newsletter in which this statement was published. The administrative judge found, in essence,

that: this did not constitute misinformation or misleading information of any sort; it was the appellant's own decision to rely on it in deciding to stay with CSRS; and the appellant was not deprived of the opportunity to make a reasoned choice. We agree.

The personnel staff of the appellant's employing agency, FCA, appears to have interpreted OPM's information as advising employees against choosing FERS based on the PPO. The record contains the following statement from M. Lynne Michele, Personnel Management Specialist for FCA:

> Like all employees covered by the Civil Service Retirement System, he [Mr. Moriarty] was given 'open season' materials to consider the benefits of transferring to FERS prior to his retirement. The only perceivable benefit that he would have gained from a change to FERS would be exemption from the Public Pension Offset. However, an official communication from OPM dated July 9, 1987, regarding this very issue strongly advised employees <u>not</u> to switch to FERS for that reason alone. The memorandum to directors of personnel from Jean M. Barber, Associate Director for Retirement and Insurance included as an attachment an employee letter with 'A Special Message for Employees Who Are Considering FERS Solely or Primarily to Eliminate the Application of the Public Pension Offset.' The only information that FCA received from OPM and passed on to its employees regarding the Public Pension Offset was that contained in the memorandum, specifically that the PPO exemption would be modified to be effective only after five years of FERS service and that such a change would be retroactive to the beginning of the open season. Subsequent to the receipt of this information and prior to Mr. Moriarty's retirement, no additional information was provided by OPM. Mr. Moriarty proceeded with his retirement plans and did not elect coverage under FERS because there was no apparent benefit to be gained.

Appeal File, Tab 6.

There is no indication, in this statement or elsewhere in the record, that Ms. Michele specifically advised the appellant not to elect FERS. The only information provided to the appellant that is described in the statement was the OPM memorandum and employee letter described above.

Contrary to Ms. Michele's assertion, the language in the OPM communication did not "strongly advise employees not to switch to FERS for that reason alone." In fact, this language simply suggests postponement of the decision until later in the open season. Since the appellant had the OPM communication, Ms. Michele's mischaracterization of it cannot be found to have misled him or to have deprived him of making an informed election.

The appellant also had been provided with the FERS Handbook. As the administrative judge found, the information in that Handbook accurately described the applicability of the PPO to employees under CSRS and FERS, and it indicated that legislation was pending and that Congress was reconsidering the application of the PPO. The Handbook stated that "Congress may reconsider whether or not the PPO should apply in additional situations." Appeal File, Tab 3(2). Thus, it indicated that all information regarding the PPO was speculative. It was within the appellant's control to track the legislation through Congress, and the record does not show any reason why the appellant could not have postponed his retirement four days to December 22, 1987, until after Congress acted

definitively, and then decided whether to elect FERS coverage within the six-month period that ended 9 days later on December 31.

Although the appellant is not alleging that his retirement was involuntary, he is alleging that he would have exercised a different option with regard to such retirement if he had not relied on misinformation. To the extent that the appellant asserts that misinformation affected his election choice and that he therefore was unable for "cause beyond his control" to elect FERS, there is inadequate support for his contention. Misleading statements upon which an employee reasonably relied to his detriment are sufficient to render an action involuntary regardless of whether there was an intent to deceive by the agency. See *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1575 (Fed. Cir. 1983). Further, the agency need not be aware that the statements were misleading -- they can be negligently or even innocently provided to the employee. *See Covington v. Department of Health and Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984). The information or statement must, nonetheless, be misleading.

Here, the appellant was in possession of accurate information available at the time. It is undisputed that the PPO was the consideration governing the appellant's choice of retirement system and that OPM was unable to give definite information about the effect of the pending legislation. That the situation was uncertain was, however,

made clear to the appellant. OPM did not mislead the appellant regarding any facts concerning the PPO. Instead, it warned the appellant that there was a real possibility that a change might occur, and that, if the change occurred, certain prospective retirees might be adversely affected. Although the change eventually made in the legislation was different from the change contemplated earlier, we cannot find that OPM misinformed the appellant. It simply provided a warning that a change was possible, and that the change might take the form described in the OPM memorandum discussed above. Thus, under the circumstances, we cannot find that the appellant's decision to stay with CSRS was based on misinformation.

The appellant argues in the alternative that, even if it is found that he did not detrimentally rely on OPM misinformation, the uncertainty attending the pending legislation was beyond his control, and deprived him of the opportunity to make an informed choice, and warrants allowance of a belated election. The Board has considered and rejected that contention in *Webb v. Office of Personnel Management*, MSPB Docket No. AT08468910174, slip opinion at 6-7 (March 13, 1991).

Because we find no evidence that the appellant was prevented, by reasons beyond his control, from making a timely election to transfer to FERS, allowance of a belated election to FERS is not warranted under 5 C.F.R. § 846.204(a).

ORDER

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. §7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

/s/ Robert E. Taylor
Clerk of the Board

Washington, D.C.